

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

Amendment to the Commission's Rules
Regarding a Plan for Sharing
the Costs of Microwave Relocation

WT Docket No. 95-157
RM-8643

**OPPOSITION OF
THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION**

The Personal Communications Industry Association ("PCIA") hereby submits its Opposition to the Petitions for Reconsideration filed in the above-captioned docket.¹ In its Order, the Commission allowed self-relocating microwave incumbents to seek reimbursement from PCS entities through the cost sharing mechanism, but provided several protections critical to ensuring that the negotiation process is not undermined. However, some incumbents are now asking the Commission to remove those protections. Specifically, the petitions propose that the right to cost sharing reimbursement be extended to any incumbent who self-relocated after April 5, 1995, that the depreciation formula not be applied to self-relocations, and that incumbents be allowed to self-relocate to leased facilities.

PCIA commends the Commission's attempt to minimize the risk of abuse of the cost sharing process by self-relocating incumbents, but remains concerned that even those efforts

¹ PCIA opposes the Petitions for Reconsideration filed by the American Petroleum Institute, WT Docket No. 95-157 (filed Apr. 16, 1997) ("API Petition"), South Carolina Public Service, WT Docket No. 95-157 Authority (filed Apr. 17, 1997) ("South Carolina Petition"), and UTC, The Telecommunications Association, WT Docket No. 95-157 (filed Apr. 17, 1997) ("UTC Petition") seeking reconsideration of the Commission's Second Report and Order (rel. Feb. 27, 1997) ("Order").

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may not prove wholly successful. If the Commission removes the prescribed safeguards, as the petitioners request, PCS entities will be left completely without protection from self-serving actions on the part of relocating incumbents. Accordingly, PCIA urges the Commission to deny the petitions and maintain its existing restrictions on self-relocation of microwave systems in the cost sharing process.

I. THE FEW SAFEGUARDS ADOPTED BY THE COMMISSION ARE ALREADY LIMITED IN THEIR EFFICACY.

While PCIA has not opposed microwave incumbent participation in cost sharing *per se*, it has many concerns regarding the problems that will be caused by the elimination of the negotiation process as the method of determining appropriate relocation reimbursement. These include:

- The lack of any independent check on the comparability of the replacement system;
- The absence of assurance that costs for the installation of the new system were reasonable;
- The potential for an incumbent that relocates its system for its own business reasons to gain reimbursement to which it would not otherwise be entitled through cost sharing;
- The ability of incumbents to circumvent the negotiation process – which the FCC relies upon to minimize relocation costs – by relocating their own links and avoiding negotiations with PCS providers;
- The potential for reimbursement obligations to be imposed on PCS systems under the proximity threshold test where a relocation obligation could have been avoided by the lack of actual interference to an incumbent;
- The lack of incentives for incumbents to seek the best costs for equipment;
- The inability of later entrants to verify the comparability of the new system to the relocated system, particularly in regards to actual usage throughput; and

- The inevitable increase in the complexity and frequency of disputes because of the absence of relocation negotiations.²

In their comments and reply comments, PCIA and PCS licensees suggested several methods for minimizing these problems, including requiring third-party cost estimates of the incumbent's relocation to a comparable system and applying the depreciation formula to incumbents who self-relocate. Importantly, however, PCIA explained that such measures alone would likely not be adequate to prevent abuse and recommended that "the FCC should as a minimum adopt these suggestions but will need to devise other measures as well to fully address the serious concerns identified herein."³ In its Order, the Commission allowed incumbent self-relocation and adopted the identified safeguards in order "to ensure that voluntarily relocating microwave incumbents do not seek reimbursement for unreasonable expenses."⁴ These include:

- Limiting the links subject to self-relocation.
- Making self-relocations subject to the same rules for reimbursements as PCS entities, including depreciation and monetary caps.
- Requiring that incumbents obtain an independent third-party appraisal of its compensable relocation costs.⁵

² Comments of the Personal Communications Industry Association, WT Docket No. 95-157 at 4-9 (filed May 28, 1996); Reply Comments of the Personal Communications Industry Association, WT Docket No. 95-157 at 4-8 (filed June 7, 1996) ("PCIA Reply Comments").

³ PCIA Reply Comments at 8 (footnote omitted).

⁴ Order, ¶ 26.

⁵ Order, ¶¶ 25-28.

Although PCIA supports the Commission's decision to adopt self-relocation safeguards, it harbors some doubt that the prescribed measures will alone be sufficient to prevent potential abuse. In particular, there will still be no way to inject cost minimization incentives into this self-relocation process. However, PCIA did not seek reconsideration of the Order because this problem is inherent in the Commission's decision to allow self-relocation compensation.

II. FURTHER WEAKENING OF THE COMMISSION'S SAFEGUARDS WILL ENSURE ABUSE OF THE SELF-RELOCATION MECHANISM.

As explained above, PCIA believes that self-relocation presents ample opportunities for abuse and that incumbents may be able to take advantage of the self-relocation mechanism despite the Commission-adopted safeguards. To further weaken these safeguards, as requested by the petitioners, would increase the likelihood of development of the problems identified by PCIA, including encouraging circumvention of the negotiation process, providing an opportunity for reimbursement above actual relocation costs, allowing recovery for links relocated for business reasons other than the reallocation of the band to PCS, and ensuring additional complex disputes.

A. Incumbents who self-relocate prior to the Commission's new rules taking effect are not entitled to reimbursement.

The petitioners request that any incumbent who self-relocated after April 5, 1995 be entitled to reimbursement from later PCS entrants.⁶ In the alternative, API requests that reimbursement be allowed for all self-relocation since April 25, 1996 because that was the date on which self-relocation was proposed by the Commission and some incumbents may have

⁶ API Petition at 4-7; South Carolina Petition at 5-9; UTC Petition at 7-9.

relocated in the “reasonable expectation” that they would be entitled to reimbursement.⁷

Neither of these requests should be granted.

During the voluntary negotiation period, which is just ending for most PCS licensees, no incumbent was required to relocate *any* of its links or even to negotiate relocation issues with PCS licensees. Thus, if an incumbent chose to relocate a link, it was either because it received reasonable compensation from a PCS entity or because it chose to do so for independent business reasons. Moreover, no incumbent who self-relocated based on a proposal in a Commission notice of proposed rulemaking could reasonably have expected to receive compensation. Finally, self-relocations prior to the rules would likely not have the required third-party assessment, and the equipment will have been long ago removed. This lack of evidence will inevitably lead to disputes between the later-entrant PCS provider and the incumbent. Accordingly, the Commission’s self-relocation policy should continue to be applied only to links relocated after adoption of its rules.

B. Self-relocating incumbents should be subject to the depreciation mechanism in the cost sharing formula.

As noted above, PCIA is concerned that incumbents will have little incentive to minimize relocation costs in a self-relocation, especially if reimbursement is likely to occur soon after relocation. In its Order, the Commission itself stressed the importance of applying depreciation as an incentive for reducing relocation costs, devoting one-quarter of its discussion on self-relocation to this issue:

⁷ API Petition at 7 n.3.

First, a microwave incumbent who voluntarily relocates itself may well obtain benefits it would not realize if it waited to be relocated by a PCS licensee. Early relocation by the incumbent on a voluntary basis provides more options for obtaining alternative spectrum, more control over the relocation process, and reduces uncertainty about future operations. Depreciation ensures that the self-relocation pays for these benefits rather than passing them on to a PCS licensee who otherwise would not have relocated the incumbent until later. Second, we observed in the *First Report and Order* that depreciation creates an incentive for the relocater to minimize costs because its own share of the cost is not depreciated....Therefore, we retain depreciation as an incentive for microwave incumbents who relocate themselves to minimize their relocation costs.⁸

PCIA agrees that applying depreciation, which ensures that an incumbent will pay at least part of the costs of its relocation, is a critical incentive for the incumbent to minimize costs, and in many cases may be the only incentive.

API, South Carolina, and UTC argue that because a PCS provider who relocates a link outside its service and spectrum block is entitled to full reimbursement without depreciation, self-relocating incumbents should receive similar treatment.⁹ This argument demonstrates both a misunderstanding of the Commission's application of the depreciation formula and a misunderstanding of the relocation rules. First, the Commission determined that depreciation should be applied to self-relocations both because the incumbent receives benefits from the early relocation, like access to better spectrum, and because it provides an incentive to minimize costs. If self-relocations are subject to depreciation, these incumbents will be responsible for paying at least a small portion of their relocation costs. This provides an

⁸ Order, ¶ 27 (footnote omitted).

⁹ API Petition at 9-11; South Carolina Petition at 9-12; UTC Petition at 2-5.

incentive to minimize the overall cost of the relocation so that the incumbent's portion is also as small as possible. These reasons are wholly unrelated to the rationale for applying cost sharing among PCS providers.

Second, the decision by the Commission not to apply depreciation to out-of-band relocations by PCS providers stems from the Commission's desire to encourage relocations of entire microwave networks. It recognizes the difficulties of determining if an out-of-band relocation was accomplished simply to benefit the relocater because of adjacent channel interference concerns or because the link was part of a network. In contrast, with a self-relocation, there is no question that the relocation takes place to benefit the incumbent microwave licensee and that the incumbent licensee gains the advantages of the early relocation because it will have had access to the new spectrum earlier, will have more control over the timing of its relocation, and will have more certainty of operations for future business plans. Paying the prescribed depreciation will hardly offset these benefits.

API, South Carolina, and UTC also argue that even without applying depreciation, incumbents will have adequate incentives to reduce costs. These incentives allegedly include: the reimbursement caps, the third-party appraisal, uncertainty regarding reimbursement, and the scrutiny of state regulators.¹⁰ As PCIA has explained before, none of these factors is sufficient to prevent abuse. First, the reimbursement caps in the cost sharing mechanism are set significantly above the Commission's expected relocation costs. PCIA fears that if the caps are the only limit, all self-relocations will result in costs closely approaching the full \$400,000 allowed by the caps. Second, although the third-party appraisal will be helpful in preventing

¹⁰ API Petition at 9-11; South Carolina Petition at 9-12; UTC Petition at 2-5.

abuse, it cannot substitute for actual negotiations in ensuring that relocation costs are properly restrained. Third, in many cases, an incumbent already will be aware that a PCS provider is planning to relocate its system, and in fact, already may have received a request for negotiations. In these cases, an incumbent can self-relocate knowing that the PCS provider will be required to provide reimbursement promptly. Finally, although some incumbents are utilities that must justify their expenditures to state regulators, most are not and, therefore, lack even this minimal check on their discretion.

C. Incumbents who self-relocate to leased services should not be eligible for reimbursement through the cost sharing mechanism.

API has requested that the Commission allow incumbents who self-relocate to leased services rather than building a new system to obtain reimbursement from PCS providers through the cost sharing plan.¹¹ API suggests that that these incumbents could be compensated based on a calculation of the net present value of the incumbent's lease through the sunset date or could receive the approximate value of what it would have cost to relocate to comparable facilities.¹² PCIA believes that such a policy would undermine the safeguards the Commission has imposed to ensure that incumbents do not abuse the self-relocation option.

There are two principal difficulties with allowing self-relocation to leased facilities. First, any incumbent who relocates to leased facilities prior to being approached by a PCS provider is likely relocating for business reasons independent of the reallocation of the band, such as a need for additional capacity. There are no incentives for the incumbent to relocate to

¹¹ API Petition at 7-9.

¹² API Petition at 8 n.4.

leased facilities because it does not gain the advantage of access to better spectrum or other benefits from early relocation. Such relocations are not entitled to reimbursement.

Second, allowing incumbents to self-relocate to leased services will make third-party appraisal of the price of a comparable system less reliable. When the incumbent's system is actually relocated to new facilities, the third party will be able to provide an exact statement of the costs incurred for the new system minus any upgrades that the incumbent installed. However, if no new system is actually built, then the appraisal will be at best an estimate, with no definitive information.¹³ Moreover, PCIA opposes allowing incumbents to collect reimbursement for leased services unless the cost is less than the cost of a comparable system, since that is the compensation to which relocated incumbents are entitled under the relocation rules.¹⁴ Although PCIA believes that in some cases incumbents may prefer leased services to constructing a new system, such a trade-off is best left to negotiations between a PCS provider and an incumbent.

III. CONCLUSION

The Commission created a self-relocation mechanism in which the convenience of self-relocation for incumbents is balanced with certain safeguards designed to provide incentives for incumbents to minimize relocation costs. Unfortunately, some incumbents are now proposing that these safeguards be weakened or removed. For the foregoing reasons, PCIA


¹³ Although PCS providers use such estimates when they have made a lump sum payment or other arrangements with an incumbent, this problem is avoided because negotiations will have taken place with the PCS provider seeking to minimize costs. Thus, an estimate in this instance will likely be more accurate.


¹⁴ 47 C.F.R. §§ 101.69-101.75.

urges the Commission to deny the petitions for reconsideration and maintain its existing relocation safeguards in order to reduce the opportunities for self-relocating incumbents to abuse the cost sharing process and the public interest.

Respectfully submitted,

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May 20, 1997

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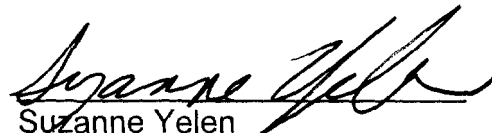
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